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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 680

REBECCA SIMON WOLFSOHN, Executrix for the Estate of Joel David Wolfsohn, Deceased, *Petitioner*

v.

GREGORY HANKIN, *pro se*, and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*

PETITIONER'S REPLY TO RESPONDENT HANKIN'S STATEMENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner's Suggestions

Grave and very bizarre circumstances are now before this Court to guide it in its deliberations on the instant petition for a Writ of Certiorari. By reason of the

admissions in respondent Hankin's brief and record in this Court, it is petitioner's fervent prayer and hope that when heard on the merits, said admissions will prove a means to curtail further excesses that have caused petitioner irreparable injury and wholly unnecessary amazing injustice and hardships. It should be noted immediately and pointed out to this Court that the last day for filing the record was December 17, 1963.

Respondent Hankin's record was previously ordered deleted and amended by the Court of Appeals on motion of his former attorney, Frederick A. Ballard, Esq., before he withdrew.[1] However, on oral argument May 13, 1963, without prior notice, petitioner was taken by surprise to learn the identical brief was before the court, amended and deleted only by substituting its cover, without Mr. Ballard's name leaving the identification "Gregory Hankin, Attorney, Pro se," and the

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[1] "1. Appellee, Gregory Hankin, moves for leave to amend his typewritten brief filed herein on March 16, 1963, by deleting question No. 4 of the Questions Presented, Part III (pages 31 to 38), and the references thereto on pages iv and 3 of the typewritten brief. The ground for this motion is as follows:

The undersigned counsel for appellee Hankin has recently been retained to argue this case on the merits, the case having been hitherto conducted by Mr. Hankin *pro se*. • • •"

"And it appears that such question should be considered independently of the merits of the present appeal.

Frederick A. Ballard
For Appelee, Gregory Hankin"

real and proper argument on the questions presented in the appeal was not made.[2]

The "S A" appendix references in respondent Hankin's instant brief, covering pages 80 to 184 of his record, is file stamped over two months after appellant's brief and even reply brief was filed below. The legerdemain used by respondent Hankin to include it in this Court was to counter-designate it as "The Supplemental Joint Appendix filed by the *appellant* herein, ' and camouflage it by bearing blue covers (appellant) instead of grey (appellee), and he also includes the name of Frederick A. Ballard as of counsel. The one and only joint appendix filed by appellant in this court appears herein as petitioner's record from pages 1 to 52, inclusive.

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[2] "STATEMENT OF QUESTIONS PRESENTED

1. Was summary judgment entered erroneously for three* appellees and later denied reconsideration thereof of the complaint and jury demand, pending motion to strike prolix pleadings controverting substantive issues of material facts of the complaint, but none in compliance with Rule 56, Fed. R. Civ. P and Local Rule 9, disputed by appellant's competent affidavits? The court acting on appellees' inappropriate record, resolved complex and involved issues within the peculiar knowledge of appellees, while in a fiduciary relationship including decedent's partnership and corporate rights (without the partnership agreement itself), and a controverted illegal settlement agreement, and whether a resignation under decedent's employment agreement was voluntary or involuntary.

2. In the same context, was summary judgment for appellant erroneously denied upon disclosure that the pretended and elaborate theory of an oral and voluntary resignation to the individual appellee, was sham and spurious by the discovery of previously concealed minutes of February 11, 1959, supporting the written demand upon the PIMCO Board, that decendent's resignation was involuntary.

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* There are now only two remaining appellees (See JA—49)"

Respondent Hankin's counter-designated record upon which his brief relies, containing scurrilous and derogatory material, filed late on December 18, 1963.

There Never Was a Bona Fide Issue of An Untimely Appeal Since Respondent Hankin Seeking a Judge of His Own Choice Forced Continuances in the District Court Until November 1, 1962. Notice of Appeal Was Filed November 3, 1962.*

In the light of *Thompson* v. *Immigration Service 496*, this Court decided January 6, 1964 (7th Cir.) — F. 2nd — the Court of Appeals erroneously rejected the uncontested petition for reconsideration and en banc (Petn. Rec. p. 61-73) which relied on the principles and spirit of *Harris Truck Lines* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215. The instant petition emphasized that the dismissal of the lower court was in conflict with Harris, supra (Petn. Rec. pp. 9-10).

Here the hardship was far greater than in Thompson, far greater than in Harris, because the Motion Judges of the Court of Appeals on January 25, 1963, had originally denied the motion to dismiss the appeal (Petn. Rec. pp. 53-56), long before the costly proceedings that followed. Moreover, the very circumstances pertaining to service and filing that prompted the dissent in Thompson do not exist. Here the mandatory requirements were fully met. Here there was no question of excusable neglect, because in fact there was no neglect. Opposing counsel were advised together with the court that the motion was dictated by petitioner's counsel from the hospital where he was recovering from an illness involving major surgery and endorsed their

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* See Footnote 3—(Addendum from Resp. Hankin Rec. p. 239)

approval upon the motion for the continuance. The motion, filing, and order were all accomplished within 4 days of the entry of judgment on May 7, 1962, and fully accomplished without any further continuances. There was still 26 days left to appeal. There was no ambiguity of intent to appeal.

If the trial court had chosen to deny the request of so timely a motion under these unique circumstances, there was still 26 days left to secure associate counsel, or petitioner herself could have secured another attorney to protect her interests. Is there any reasonable doubt in any mind that a lawyer having his client's interest at heart sufficiently to endeavor to protect her within four days after entry of judgment from a hospital bed would have failed to do so within the remaining 26 days?

This Court in *Thompson, supra* (citing *Harris*) said "a motions judge was entitled to 'great deference by the reviewing court' in the light of the 'obvious great hardship to a party who relies upon the trial judge's finding.'" Having been put on notice by the action of its own motions court in denying appellee's motion to dismiss the appeal January 25, 1963, the Court of Appeals should have approached the dismissal, and overruling of the District Court with reluctance and extreme caution, which it failed to do. It read into petitioner's appeal an erroneous view, contrary to the facts, something that did not exist. Petitioner was unfairly prejudiced thereby and suffered irreparable injury and hardship.

Respondent Hankin drafted the order denying the motion to vacate the summary judgment entered on May 7, 1962, and jury demand on October 20th, 1962. It could not be appealed from the next day because

respondent had other motions which he wished to be heard simultaneously, and in seeking a judge of his choice compelled continuances until November 1, 1962.[3] The notice of appeal was filed 2 days thereafter (Petn. Rec. J.A. p. 52).

In the Court of Appeals the concept that the notice of appeal was untimely was an afterthought, subsequent to filing an answer to appellant's motion for summary reversal. The jurisdictional statement by appellee Gregory Hankin in his lower court brief states "The order which was sought to be reconsidered was rendered on May 7, 1962."

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[3] "ADDENDUM—Note With Reply As To Record No. 17440

The Notice of Appeal was filed November 3, 1962. Appellant requested and was granted a forthwith order on November 5, 1962. The failure of the lower court to release the record, made a preliminary record necessary and explains the appendix attached to Appellants Motion for Summary Reversal. The order on the hearing held November 1, 1962, has now been signed, and the lower court's complete record will be released and filed, either December 11th, or December 12th, 1962, in apt time to be considered with pending motions in this court.

The circumstances that divided the record was a letter from Appellee Gregory Hankin, dated September 11th, 1962, objecting to the hearing before Judge Leonard P. Walsh, on September 28, 1962. At the hearing on November 1, 1962, reset before Judge McLaughlin, Mr. Hankin, without previous notice, introduced an alleged counter-claim at the rate of $105.00 per hour, for 228 hours, or $23,940 for fees, on the theory, (based upon the pleadings in the case) that it had matured after judgment.

The defendant Consumers Investment Fund, Inc. has been dismissed from these proceedings.

The defendant, Professional Investment Company, appears herein without counsel as appellee, for the reason that Appelee Gregory Hankin, has filed a motion to withdraw as counsel, leaving him to appear Pro Se, which has been granted.

Fred I. Simon"

(See Respondent Hankin Rec. p. 239)

In *Foman* v. *Davis*, 371 U.S. 178, 180-182 (1962), this Court concluded that the manifest intention of the petitioner to appeal and challenge the dismissal, could be determined both as to the dismissal and denial of the motions on the statements of points, and with all the foregoing the petitioner complied.

Here through a rare combination of unique circumstances the clear and unequivocal intention to appeal of the petitioner is supported by the counter-designated record of respondent Hankin at the "Addendum" (p. 6, supra), but transposed (although petitioner's letter was written 3 months later), to make the false implication in the first of Hankin's lower court brief (p. 7) "In this case an attempt was made to have the motion for reconsideration submitted to another judge." A serious question arises as to how they became evidence! (Resp. H. Rec. pp. 180-183)

And finally a far more cogent reason from a lawyer's standpoint—those first facts surrounding a transaction—the *res gestae*, that points a steady finger to the truth. Here again respondent Hankin's counter-designated record has the answer, and this time it is in petitioner's "Motion for Summary Reversal" filed December 5, 1962 (Res. H. Rec. pp. 185-221). If in the mind of respondent there was an untimely appeal in either the District or the Court of Appeals, then it should have been reflected the very next day in his opposition statement entitled, "Appellee's Motion to Strike Motion for Summary Reversal" filed December 6, 1962 (Resp. H. pp. 223-231). Those were the first two documents in the proceedings below. That was the time when either side would have spoken about an untimely appeal if it really had existed, and that was the time the Court of Appeals should have been

shocked out of its torpor with that ugly Hankin phrase, "stripped of all scandalous and irrevelant matters, the complaint might be found to state no cause of action." (Resp. Rec. p. 227). It was the lower court's duty immediately to seek the truth, and it failed again and again to do so! The concept of an untimely appeal by respondent Hankin is a spurious after thought. That it is fiction and known to be such by respondent Hankin is supported by the record the Court of Appeals studied, and that is why petitioner is in this court praying for a Writ of Certiorari.

Petitioner's Motion of June 11, 1962, Under Rule 60(b) Disclosed Serious Fiduciary Violations by Respondent Hankin. Discovered for First Time Subsequent to Instant Lawsuit at Annual Meeting of Stockholders; Was Both Newly Discovered and Fraudulent Evidence and Both District Court and Court of Appeals Erred in Not Ending the Litigation and Alleviating the Hardships of Petitioner.

The relevant portion of Rule 60(b)(3) as another ground to grant relief from a final judgment, ignored by the Court of Appeals in the instant case reads:

> "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

Petitioner, of course, was fully aware of the fact that respondent Hankin's pretense of an untimely appeal was sham, but in her petition for a Writ of Certiorari, she chose to argue on other adequate grounds appearing in the petition. The confusing and uncertain phrase concluding the Court of Appeals opinion was treated by petitioner as "a gratuitous statement not essential to the appeal" (Petn. Br. p. 10).

Respondent Hankin (Res. H. Br. p. 9) elected to do otherwise. He states the Court of Appeals exercized jurisdiction, treated the Notice of Appeal as an appeal from the Order of October 12, 1962, and throughout his brief states there was no appeal taken from the judgment of May 7, 1962. The judgment of the Court of Appeals, however, states, "* * * the appeal from the judgment of May 7, 1962, is hereby dismissed * * *." Further (Res. Br. p. 9) and elsewhere, he discloses the actual basis upon which summary judgment was entered in the District Court was upon controverted facts in the pleadings. It was the duty of the Court of Appeals to consider petitioner's reply to respondent Hankin which in justice and fairness, and surely as a matter of law, could have and should have stopped respondents then and there.[4]

Respondent argues at page 9 of his brief the crucial concealed minutes of February 11, 1959, and states further the factual dispute in the pleadings that Mr. Wolfsohn resigned voluntarily. He did not state that at page 207 of his counter-designated record is petitioner's statement:

> "1. The minutes of February 11, 1959, previously concealed by appellees were crucial and disclosure belied appellees' refuted theory and defense, which was that nothing had transpired between January 19, 1959 and March 9, 1959." (Resp. Rec. p. 207)

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[4] "1. Appellees' frivolous status in this appeal is emphasized by their continued attempt to justify their own version of the factual dispute. In a motion for summary judgment that is the very antithesis of what is proper. It would only be correct to show that no controversy exists. It is the existence of a controversy on the issues rather than the absence of one; in a large measure it is the basis of this appeal by appellant. Appellees' motion to strike admits matters of substance, is without equity and devoid of law." (Pet. H. Rec. p. 232)

Respondent Hankin referred to the demand by deceased, a two-page document signed by him, bearing his initials with the notation in his handwriting, "Read by JDW to Board Meeting Jan. 19, 1959" (JA pp. 47, 48). It concludes:

> "I therefore involuntarily tender my resignation, and demand under the terms of my contract, that I be paid promptly the sum of $10,000.00 due me for the balance of my contract.
>
> /s/ Joel D. Wolfsohn"

Mr. Hankin did not disclose the minutes of January 19, 1959 of the Board of Directors of PIMCO included:

> "During the course of this discussion Mr. Wolfsohn tendered his resignation as Vice President, Secretary and Director." * * * "Adoption of the resolution was accompanied by a request that Mr. Wolfsohn withdraw his resignation. This he declined to do * * *. If it was not withdrawn then a special meeting of the Board would be called to consider the situation." (Res. H. Rec. pp. 103-104)

As evidence of his good faith in this Court, he should have said that the affidavit of Gregory Hankin, President of PIMCO, filed February 7, 1962, upon which summary judgment was rendered alleges:

> "10. * * * the affiant did state, in December 1958 or in January 1959, that he would not support Mr. Wolfsohn's re-election to the Board. It was because of this statement that the decedent appeared at the meeting held on January 19, 1959, tendered his resignation and read a statement defending his work and effort for the Corporation and demanded the sum of $10,000 * * *.

> 11. No special meeting was held before the annual meeting of the stockholders on March 9, 1959 * * *
>
> /s/ Gregory Hankin" (JA p. 16-17)

In support of his motion to secure $1,000 attorney's fees, respondent had stated:

> "(b) The defendant Gregory Hankin made all books, papers, documents etc., available to the attorney for the plaintiff. At least this much must be admitted by him." (Resp. Rec. p. 131)

Said respondent did not state that in the Court of Appeals record, now in the Supreme Court, respondent Hankin admits:

> "The Minutes of the Stockholders and the Board of Directors of PIMCO were in one book; while the minutes of the committee (Executive and Investment) were in another book. * * * The situation was so tense that Mr. Hankin forgot all about the minute book of the Committee and Mr. Simon never did get to see it." (Resp. Rec. p. 270, 271).

The original complaint rested on an employment contract with PIMCO and Mr. Wolfsohn's demand for $10,000 under its terms. PIMCO obviously was a client of Chapman and Wolfsohn and its legal counsel. Respondent Hankin had an identical employment contract except that he was a full-time employee at $100.00 per week or $5,000 per year (JA p. 16). Mr. Wolfsohn's employment contract was at the rate of $2,500 per year (JA p. 16). Respondent Hankin's status was never that of a defending attorney, but as his own record shows, his status was:

> "(c) The defendant Gregory Hankin violated fiduciary relationship and responsibilities" (Resp. Rec. p. 256).

After the annual meeting of stockholders, a motion to vacate was made on June 11, 1962, which was denied without a hearing and without an opportunity to amend the complaint. If the hearing had been granted, the complaint would have been amended as a class suit in the manner shown at his record, p. 255.

Plaintiff's grounds were:

> "(e) The financial manipulation of the said Hankin, while in said fiduciary relationship to the stockholders, depressed the value of the stock from $10 per share to 30¢ per share, to achieve secret gain for himself." (Resp. Rec. p. 256).

That information was before the District Court and the Court of Appeals, and should have been sufficient grounds, supported by substantial documentary evidence and fraudulent misconduct of respondent, who utilized the opportunity of Mr. Wolfsohn's untimely death to perpetrate a tremendous hoax upon the stockholders and thereafter upon the courts below.

The demand presented January 19, 1959, to the PIMCO Board refutes very clearly respondent Hankin's representation to this Court at page 3 of his brief, as to what PIMCO's by-laws really provided. The decedent Mr. Wolfsohn states:

> "At the meeting of the Executive Committee on Monday, January 12, without any prior notice to me, he announced that he could not recommend my re-election to the Board, and pointed out that under the By-laws, only Board members may hold office. This then I construe as being removed from office involuntarily and in violation of my contract with Professional Investment Management Co."

The source for Mr. Wolfsohn's information then was from PIMCO's bylaws, as he knew them, and as

they existed during his lifetime and within his knowledge. Moreover Mr. Hankin said so! (JA p. 48)

This then was respondent Hankin's *"piece de resistance."* With the whirling weathervane of kaleidoscope theories, from court to court, and between motions, for petitioner it seemed to be a good idea not to disturb the record.

Lawyers, if they feel a complaint is defective and states no cause of action, have recourse under Federal Rules, if they have had more than one case under their belt. Respondent Hankin chose to try for an additional $1,000,[5] (later amended to $23,940).

Respondent Hankin's Record in the Supreme Court Discloses He Planned to Secure $50,000 Through the Merger Instead of $25,000.

The decedent died on July 9, 1961 (JA 9). The complaint was filed after Oscar L. Chapman, respondents' former counsel, turned the matter over to her present counsel to enforce collection (JA 2-3). Defendants' pleadings upon which summary judgment, adverse to plaintiff, was argued prior to the stockholders annual meeting.

On March 25, 1963 PIMCO notified the Clerk of the Court of Appeals that its interests were not being

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[5] "The defendant further submits that the Court may, and in the opinion of defendant should, of its own motion take disciplinary action against Mr. Fred I. Simon, attorney for the plaintiff, for the repeated offenses committed by him against the dignity of the Court, in the following particulars:

1. By including false, scandalous and irrelevant matter in the complaint (to wit, in paragraph 5 thereof), and by causing the plaintiff to file an affidavit containing false, abusive and scandalous matter (to wit, in paragraphs 5, 6 and 7 thereof)." Thereafter respondent repeatedly stated, "That paragraph 5 of the motion which states Mr. Hankin received $72,000 was libelous innuendo."

represented in accordance with the letter appended hereto at the end of this brief. The letter was then supported by affidavit of Douglas Thornsjo of PIMCO and associated companies.

Petitioner in preparation of the instant appeal reluctantly examined respondent Hankin's counter-designated record. At page 272 thereof the following appears:

> "Mr. Hankin took all of his compensation for salary and fees at the rate of $10.00 per share."

The PIMCO stock was computed "December 31, 1960 —30¢ per share, and:

> "In January 1961, Mr. Hankin became entitled to an option to purchase 5,000 shares of stock in Consumer Investor Planning Corporation at $1.00 per share, or (at the option of the corporation) to $50,000. In the contract with Investment Policies, Inc. he agreed to give up his commissions and his option, leaving only the salary of $25,000."*

Since this was a fast settlement after suit was filed with no disclosure to the stockholders, in which practically all the members of Mr. Wolfsohn's family and friends were interested, these new disclosures indicate that respondent Hankin indulgently gave up $25,000, which never would have happened, of course, if suit on the simple contract and demand due the widow of decedent had been paid.

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* The Court of Appeals was advised (Resp. Rec. p. 236): "The Court of James Blacksone, *Ken. Lib. Assn.* v. *Gulf M. & O.R. Co.*, 264 F. 2d 445 said, 'Majority stockholders of a corporation occupy a fiduciary relationship toward minority stockholders, and when purchasing their shares are under an obligation to divulge all material facts."

In addition to the usual definition of hardship of injustice, oppression and embarrassment, etc., Webster's Unabridged 2nd Edition defines "hardship": "Hard circumstances of life. A thing hard to bear."

The Court of Appeals Misconceived the Status of PIMCO as Respondent.

It is not the function of petitioner to get involved with disputes between respondents and their attorneys unless legal transgressions require as a matter of duty and as an officer of the court, or as in this case where legal rights are directly affected. Here these matters are of major legal significance affecting petitioner. The Court of Appeals treated PIMCO's failure to file a brief as tantamount to dismissal, despite the fact that summary judgment was entered jointly, because of respondent Hankin's refusal to represent it.

The docket entries of the Court of Appeals are:

5-13-63 Argued before Edgerton, Senior Circuit Judge, and Wright and McGowan, Circuit Judges. The court announced denial of appellant's motion to direct Clerk to enforce Rule 14(b) for failure of appellee Hankin to comply with Rule 14(a).

5-13-63 Statement of Roger W. Schnobrich for the record (fiat of H. W. Edgerton)

5-15-63 Per Curiam order denying appellant's motion to direct Clerk to enforce Rule 14(b) for failure of appellee Hankin to comply with Rule 14(a).

Based upon the foregoing, PIMCO through Roger W. Schnobrich, General Counsel for PIMCO, was granted leave to file its typed statement for the record adopting Hankin's arguments that summary judgment

was granted properly, which showed that they admitted respondent Hankin had not supplied any files or information upon which they could file a brief. However, that immediately supports the fact that the judgment entered in this case is clearly erroneous on its face, since it postulates that Hankin alone remains. Respondent Hankin's brief (p. 2) states, "The real and only Respondent herein is Gregory Hankin," and was the basis for embarrassing garnishment proceedings by him alone on Mrs. Wolfsohn's bank account, despite request for stay in apt time and after this petition was filed.

The surprise opening ruling by the Court of Appeals restored appellee Hankin's brief to the files. Its contents is without sanction by any other circuit and is clearly in violation of Rule 19(1)(b) Supreme Court Rules. As can be determined from the statement of the questions presented (supra, page 3) the fundamental impropriety of the trial court resolving a controverted dispute *without the partnership agreement itself* in entering summary judgment was a vital issue:

> "The partnership agreement was not produced in the lower court. What did the lower court interpret? What is there for the Court of Appeals to produce?" (Resp. Rec. 185 at 203)

Despite the foregoing, a typed paper bearing no signatures entitled "Partnership Agreement" appears at pages 41 to 44 inclusive, at page 38 appears "Frederick A. Ballard, Of Counsel," and it no doubt shocks all law libraries. It is not even in that grotesque book stretching from pages 82 to 184, described as respondent's "SA" appendix. If that is the only record that the Court of Appeals studied, then sand has been substituted for integrity in the instant proceedings.

Conclusion

It is respectfully urged that Writ of Certiorari be granted, and an appropriate order in connection therewith.

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Professional Investment Management Co.

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March 25, 1963

Nathan J. Paulson, Clerk
United States Court of Appeals
For the District of Columbia Circuit
Constitution Avenue and John Marshall Place N. W.
Washington, D. C.

Re: Wolfsohn vs. Hankin and Professional Investment Management Co.
Civil Number 17449
Our File Number - LF-2361 B

Dear Mr. Paulson:

This letter is written pursuant to a telephone conversation between Douglas Thornsjo, President of Professional Investment Management Company ..... your Deputy Clerk handling the above noted case of this afternoon. Your Deputy is sending to us applications to practice before your Court.

For reference, I might explain briefly that Mr. Hankin had been representing this corporation, as well as himself, earlier in this litigation. Mr. Thornsjo was advised Friday that Mr. Hankin had withdrawn as counsel for the corporation and that no one, in fact, had appeared in this appeal on its behalf. I wish to reiterate that this information was received by corporate officers late Friday afternoon for the first time. You can understand our consternation in trying to determine a course of action when we learned that time for filing our brief expired tomorrow.

You may be assured that applications for admission to practice before your Court for the undersigned will be submitted immediately upon receipt of the forms from your Deputy. The enclosed original and three copies of a motion to extend the time for filing Appellee--Professional Investment Management Co. brief in this matter for thirty days is respectfully submitted with the understanding concerning the above mentioned application for admission to practice.

We appreciate that this is a strange request, but ask the Court's indulgence by reason of the circumstances involved. Your attention to this matter will be greatly appreciated.

Very truly yours,

Donald C. Sheehan